

The Commission should reject the arguments of those commenters objecting to modification of its anti-buyout rule.^{68/} First, their arguments appear to be premised on the misplaced notion that telco/cable competition represents the only conceivable form of multichannel video programming competition.^{69/} In fact, DBS service is available throughout the continental United States and the number of MMDS providers offering competing multichannel programming continues to grow.^{70/} Second, contrary to assertions by those opposing modifications of the buyout rules,^{71/} an overly restrictive policy against buyouts might thwart infrastructure improvements, since such a policy would prevent capital in the communications industry from being redeployed efficiently and reinvested in new services. Third, some commenters express concern that a permissive buyouts policy will encourage the displacement of franchised cable systems by unfranchised video dialtone systems.^{72/} While this argument does highlight the need for the Commission to address the circumstances under which telcos

^{68/} NATOA Comments at 15-18; CME Comments at 2-7; Alliance for Communications Democracy Comments at 11-14.

^{69/} NATOA Comments at 15 (buyout prohibition "is central to the Commission's goal...to promote competition") (emphasis in original); CME Comments at 2-3; Alliance for Communications Democracy Comments at 11-12.

^{70/} See, e.g., "DBS business flying high," Broadcasting & Cable, Jan. 9, 1995, at 55 ("While RCA says it has shipped nearly 600,000 of the Digital Satellite Systems used to receive DIRECTV and USSB, PRIMESTAR says it tripled its subscriber count between August and January, putting more than 250,000 receivers into service by the end of 1994."); Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 94-48, First Report, (rel. Sept. 28, 1994) at ¶ 79.

^{71/} Cf. Alliance for Communications Democracy Comments at 12 ("by definition, the buyout of an existing cable system by a LEC would result in no improvement in the communications infrastructure").

^{72/} NATOA Comments 16-18; Alliance for Communications Democracy Comments 12.

must comply with Title VI obligations, it is not a compelling reason to prevent telcos from purchasing cable systems in markets where two-wire competition is unsustainable.

The proposed exceptions advanced by advocates for the Commission's current anti-buyout policy are completely unworkable. An exceptions policy that relies wholly on a case-by-case review of each buyout would introduce substantial uncertainty into the marketplace. Some commenters would preclude any cable operator short of outright bankruptcy from selling its facilities to a telco.^{73/} Such a proposal defies economic reality, will generate capital flow inefficiencies, and will further depress the market value of marginally performing -- albeit not bankrupt -- cable systems by restricting the range of potential acquirors. Government policies should not force entrepreneurs to remain in business in communities where market forces render their continued participation unprofitable. Without an exception for communities of 50,000 inhabitants or fewer, decisions on telecommunications investment and capital deployment in many markets will be stymied by uncertainty or dictated by the Federal government rather than market forces.

IV. RULES BARRING DISCRIMINATORY USE OF POLE AND CONDUIT SPACE BY TELCOS ARE A COMPETITIVE NECESSITY

While predictably resisted by the telcos, non-LEC commenters addressing the issue support the establishment of rules designed to prevent the telcos from leveraging their control

^{73/} CME Comments at 6 ("The exception, if any, would apply only if the owner of the facilities is on the verge of bankruptcy, and no other buyer is available for the cable owned facilities."); NATOA Comments at n. 6 (buyouts should only be permitted in exceptional circumstances, such as where "a LEC is the only entity capable of assuming the operation of a poorly performing (e.g., bankrupt) or abandoned cable system").

over pole and conduit space in an anti-competitive manner.^{74/} These rules are a necessary measure to ensure video programming competition.

The LECs contend that current rules protect against any anti-competitive leveraging of their control over poles and conduits.^{75/} US West asserts that its poles and conduits are not essential facilities and that LECs therefore "have no realistic ability to prevent, or significantly impede, development of competition by facilities-based programmers."^{76/} GTE suggests that additional rules are unnecessary because, in the video dialtone environment, it "will be dealing directly with programmers, not cable operators planning to build new wireline systems to compete with existing operators."^{77/}

The LECs' arguments, however, are belied by the extensive instances of recent discriminatory conduct by telcos against cable operators that are delineated in comments filed in this proceeding.^{78/} It is particularly significant that the LECs have sought to use their control over pole and conduit space to block proposed fiber upgrades by cable operators,^{79/}

^{74/} See, e.g., AT&T Comments at 10-12; Comments of the Public Service Commission of the District of Columbia at 3-4; NATOA Comments at 18.

^{75/} See, e.g., Ameritech Comments at 9-10; BellSouth Comments at 9; GTE Comments at 18-19.

^{76/} US West Comments at 30.

^{77/} GTE Comments at 19.

^{78/} See Pole Attachment Comments of Continental Cablevision, Inc., et al. ("Pole Attachment Comments") at 21-29; NECTA Comments at 18-19. The Commission itself recently admonished telcos to be aware of their responsibilities regarding pole attachments. See "Common Carrier Bureau Cautions Owners of Utility Poles," DA 95-35 (Jan. 11, 1995).

^{79/} Pole Attachment Comments at 21-22.

since such conduct thwarts precisely the type of two-wire, multi-service competition envisioned by the Commission.

There is clearly ample basis in the record for establishing additional rules designed to ensure competitive parity between cable operators and the LECs that control access to facilities that are essential to the distribution of cable and other telecommunications services. NCTA urges the Commission to adopt the rules outlined in the Pole Attachment Comments, as well as the pole attachment charge imputation proposal discussed in NCTA's initial comments.^{80/}

CONCLUSION

The Commission must ensure non-discriminatory access to the video platforms for all programmers. To this end, it should reject proposals that would allow telcos to play a direct or indirect role in the development and administration of channel-sharing arrangements, and decline to mandate or permit preferential access to the video platform for certain classes of programmers. For the reasons set forth above, the Commission should also establish an

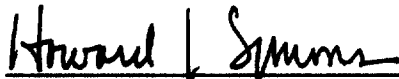
^{80/} While helpful, NCTA believes that a mere certification by the LECs in their Section 214 applications that pole and conduit space is available on reasonable terms and conditions will not suffice to protect competition and prevent discrimination. Cf. Reconsideration Order at ¶ 285; see also United and Central Telephone Companies Comments at 9. The record in this proceeding contains evidence of anti-competitive conduct indicating that more stringent safeguards are necessary to ensure fair competition between telcos and cable operators in both the video and telephony markets. See, e.g., Pole Attachment Comments at 26 ("a GTE official stated that because 'the nature of our business had changed and because we were now competitors,...an extra amount of care would be taken in looking at all future applications for either pole or duct rentals").

exception to its buyout restriction for communities with less than 50,000 inhabitants and adopt rules to prohibit telcos from using their pole or conduit space in a discriminatory or anti-competitive manner.

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